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In the

Supreme Court of the United States

LIVONIA PROPERTIES HOLDINGS, L.L.C.,
Petitioner,

v.

12840-12976 FARMINGTON ROAD HOLDINGS, L.L.C.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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January 26, 2011

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QUESTION PRESENTED

Respondent has attempted to foreclose a Mortgage on property owned by Petitioner in Wayne County, Michigan through a non-judicial, summary proceeding called "foreclosure by advertisement" (the alternative being a judicial foreclosure proceeding in a Michigan circuit court). This procedure, which is a contract right set forth in the Mortgage, is regulated by Michigan statute. Case law interpreting this statute requires the recording of "all assignments" of the mortgage with the county register of deeds if someone other than the original mortgagee is attempting to foreclose by advertisement.

There is no dispute that "all assignments" purporting to lead to Respondent are not recorded with the Wayne County Register of Deeds (three assignments, in fact, have not been recorded). It is also a fact that the first transfer on which Respondent relies (to establish that it is the proper party to assert the contractual foreclosure by advertisement right) purported to transfer the Mortgage to another, interim entity at a time when the original mortgagee clearly no longer held the Mortgage (the Mortgage had already been assigned to another entity). Therefore, not only is the information in Register of Deeds relating to this property inaccurate, but the purported "chain of title" on which Respondent relies contains is flawed.

Petitioner instituted this lawsuit to enjoin the Respondent from foreclosing the Mortgage by advertisement. After a Temporary Restraining Order was entered, the District Court denied the request for injunction. Petitioner filed an interlocutory appeal by right to the Circuit Court, which affirmed the District

Court. Embedded in the lower courts' opinions is that it does not matter if the record chain of title is wrong, and Petitioner, which will lose millions of dollars of property, has no standing to complain that the chain of title on which Respondent relies is missing a chain link.

1. Did the District Court abuse its discretion in denying Petitioner's request for an injunction, enjoining the foreclosure of the properties through the summary proceeding of foreclosure by advertisement?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The Petitioner is Livonia Properties Holdings, L.L.C., the Plaintiff in a civil action in the United States District Court for the Eastern District of Michigan (Case No. 10-CV-11589) and the Appellant in the United States Court of Appeals for the Sixth Circuit (Case No. 10-1782).

For Petitioner, there is no parent or publicly held company owning 10% or more of the company's stock.

The Respondent is 12840-12976 Farmington Road Holdings, L.L.C., the Defendant in the United States District Court for the Eastern District of Michigan and the Appellee in the United States Court of Appeals for the Sixth Circuit.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review: (i) a May 13, 2010 Opinion and Order of the United States District Court for the Eastern District of Michigan Denying Plaintiff's Motion for Preliminary Injunction and Dissolving Temporary Restraining Order; and (ii) an October 28, 2010 Opinion and Order of the United States Court of Appeals for the Sixth Circuit affirming the May 13, 2010 Opinion and Order of the District Court.

OPINIONS BELOW

The April 15, 2010 Temporary Restraining Order and Order to Show Cause of the Third Judicial Circuit Court for the State of Michigan (Case Number 10-004441-NZ) is not a reported decision. It is reproduced in **Appendix E**.

The April 22, 2010 Order of the United States District Court for the Eastern District of Michigan Extending Effect of Temporary Restraining Order (Case Number 10-CV-11589) is not a reported decision. It is reproduced in **Appendix D**.

The May 13, 2010 Opinion and Order of the Eastern District of Michigan Denying Plaintiff's Motion for Preliminary Injunction and Dissolving Temporary Restraining Order is a reported decision (717 F. Supp. 2d 724). It is reproduced in **Appendix C**.

The June 15, 2010 Order of the United States Court of Appeals for the Sixth Circuit Denying Appellant's Emergency Motion for Temporary Restraining Order

is not a reported decision. It is reproduced in **Appendix B**.

The October 28, 2010 Opinion and Order of the Sixth Circuit affirming the May 13, 2010 Opinion and Order of the District Court is not a reported decision. It is reproduced in **Appendix A**.

JURISDICTION

Petitioner's appeal to United States Court of Appeals for the Sixth Circuit resulted in an October 28, 2010 Opinion and Order affirming the May 13, 2010 decision of the U.S. District Court.

The jurisdiction of this Court is invoked pursuant to 28 USC § 1254(1). The petition is timely pursuant to 28 USC § 2101(c) because the petition was filed within ninety days of the Circuit Court's decision.

STATUTORY PROVISIONS INVOLVED

Mich. Comp. Laws § 600.3204 provides, in relevant part:

> (1) Subject to subsection (4), a party may foreclose a mortgage by advertisement if all of the following circumstances exist:
>
> (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.
>
> (b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage; or, if

> an action or proceeding has been instituted, the action or proceeding has been discontinued; or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part.
>
> (c) The mortgage containing the power of sale has been properly recorded.
>
> (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.
>
> . . .
>
> (3) If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage. . . .

STATEMENT OF THE CASE

On April 15, 2010, Plaintiff (and Petitioner) Livonia Properties Holdings, L.L.C. ("Livonia Properties") filed an action against Defendant (and Respondent) Farmington Road Holdings, L.L.C. ("Farmington Road") in the Third Judicial Circuit Court for the State of Michigan ("State Court"), seeking a declaratory judgment and an injunction enjoining Farmington Road, as the purported lender and mortgagee, from selling, "by advertisement," (a process regulated by Michigan statute) four parcels of commercial real estate owned by Livonia Properties. Livonia

Properties also asserted claims of conversion, trespass to chattels, and breach of contract.

On the same day, the State Court entered a Temporary Restraining Order restraining the sale of the parcels, and scheduled a hearing for April 21, 2010 on whether the Restraining Order should ripen into a preliminary injunction. **Appendix E**.

On April 20, 2010, Farmington Road filed a notice of removal with the clerk of the United States District Court for the Eastern District of Michigan ("District Court"), citing diversity of citizenship as the basis for jurisdiction.

On April 22, 2010 the District Court entered an Order Extending the Effect of State Court's Temporary Restraining Order, entered a briefing schedule on the issue of whether the Temporary Restraining Order should ripen into a preliminary injunction, and scheduled a hearing on the motion for May 13, 2010. **Appendix D**.

On May 13, 2010, the District Court, without hearing argument, announced its decision from the bench and issued an Opinion and Order Denying Plaintiff's Motion for Preliminary Injunction and Dissolving Temporary Restraining Order (not served on the parties until May 14, 2010). **Appendix C**.

On June 11, 2010, relying on 28 USC § 1292(a)(1), Livonia Properties filed an interlocutory appeal to the United States Court of Appeals for the Sixth Circuit ("Circuit Court") seeking review of the District Court's May 13, 2010 Opinion and Order.

On June 14, 2010, Livonia Properties filed an Emergency Motion in the Circuit Court seeking to have the Circuit Court set aside the District Court's May 13, 2010 Opinion and Order and requesting that the Circuit Court issue a preliminary injunction enjoining the sale of the parcels.

On June 15, 2010, the Circuit Court entered an Order Denying Appellant's Emergency Motion for Temporary Restraining Order. **Appendix B**.

By way of a June 15, 2010 letter to counsel, the Circuit Court issued a briefing schedule for the appeal.

By way of an August 2, 2010 letter to counsel, the Circuit Court scheduled oral argument for October 15, 2010.

Argument on the appeal proceeded on October 15, 2010.

On October 28, 2010, the Circuit Court issued an Opinion and Order affirming the District Court's Opinion and Order. **Appendix A**.

Livonia Properties has now timely petitioned this Court for a writ of certiorari to the Circuit Court.

STATEMENT OF THE FACTS

On December 2, 2004, Livonia Properties entered into a loan agreement with Lehman Brothers Bank, FSB ("Lehman Brothers"). A Promissory Note ("Note") in the amount of $16,300,000.00 (Sixteen Million Three Hundred Thousand and 00/100) was executed on the same day. ***Refer to*** **Petitioner's April 15, 2010**

Verified Complaint, Exhibit 2 (Promissory Note). A Mortgage ("Mortgage") was also placed on four commercial properties owned by Livonia Properties in Livonia, Michigan to secure payment of the loan. ***Refer to* id. at Exhibit 1 (Mortgage).** The Mortgage was recorded with the Wayne County Register of Deeds on January 24, 2005. ***Refer to* Petitioner's April 29, 2010 Supplemental Brief in Support of Motion for Preliminary Injunction, Exhibit 16 (Title Search) (District Court Docket Number 15).**

The Mortgage grants the lender, upon an event of default, the right to foreclose the Mortgage through a summary, non-judicial procedure "by advertisement." Meaning that the lender can advertise a sale of the mortgaged property, hold a public auction through the county sheriff, and sell the property to the highest bidder to pay the indebtedness owed on Note. This right is regulated by Michigan statute as set forth in Michigan Compiled Laws § 600.3201, *et. seq*. and may only be enforced if the lender proceeds in accordance with those provisions.

Farmington Road claims to be the assignee of the Note and Mortgage (as well as other documents associated with the loan package). Farmington Road claims that:

(i) Pursuant to a January 6, 2005 Assignment, Lehman Brothers assigned the loan documents to LaSalle Bank National Association, as trustee for the registered holders of "LB-UBS Commercial Mortgage Trust 2005-Commercial Mortgage Pass-through

> Certificates, Series 2005-C1" (the "Trust") (***refer to* Petitioner's State Court Motion for Temporary Restraining Order and Preliminary Injunction, Exhibit 7 (Assignment)**); and
>
> (ii) Pursuant to a March 3, 2010 Assignment, the Trust assigned the loan documents to Farmington Road. ***Refer to* id. at Exhibit 8 (Assignment)**.

On January 6, 2005, the Trust did not exist (as will be discussed, it was not formed until February 8, 2005). To that end, the Assignment to the Trust was in blank. An asterisk (i.e., " * ") was marked in the place where the assignee's name would be filled. At some point later on (unknown at this point and Farmington Road refuses to say), a stamp was placed by someone onto the bottom of the Assignment bearing the name of the Trust (in an area designated as a portion to be "intentionally left blank").

The Assignment to the then non-existent Trust was problematic. Michigan law requires present intent to assign contract documents to a specific assignee:

> An assignment is defined as "[a] transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein." Black's Law Dictionary (4th ed), p 153. **To constitute a valid assignment there must be a perfected transaction between the parties which is intended to vest in the assignee a present right in the thing assigned**.

Weston v. Dowty, 163 Mich. App. 238, 242; 414 N.W.2d 165 (1987) (emphasis added). And additionally:

> In determining whether an assignment has been made, the question is one of intent. A written agreement assigning a subject matter must manifest the assignor's intent to transfer the subject matter *clearly* and unconditionally *to **the** assignee*."

Burkhardt v. Bailey, 260 Mich. App. 636, 655; 680 N.W.2d 453 (2004) (emphasis added) (quotes and citation omitted).

The Assignment also reveals that it was not filed with the Wayne County Register of Deeds until November 15, 2005, some eleven months after its purported execution.

Farmington Road claims that there has been a default in payment of the Note. To that end, Farmington Road began taking measures to foreclose the Mortgage and sell the properties by advertisement. Farmington Road published notices in a newspaper advising that the sheriff of Wayne County, Michigan would auction the properties to the highest bidder on April 22, 2010. ***Refer to* Verified Complaint, Exhibit 3 (Notice of Sale)**.

After efforts to resolve issues with Farmington Road's legal counsel without judicial intervention were unsuccessful, Livonia Properties initiated an action in the State Court on April 15, 2010. Livonia Properties appeared before the State Court judge on the same day (with Farmington Road's counsel present (i.e., not *ex parte*) seeking a temporary restraining order and a

hearing on a motion for preliminary injunction. In seeking an injunction to enjoin the sale, in addition to other arguments, Livonia Properties contended that Livonia Properties lacked the authority to foreclose the Mortgage by advertisement because Livonia Properties was not properly proceeding in accordance with foreclosure by advertisement statute, the above referenced MCL § 600.3201, *et. seq*.

In spite of the chain of title on which Farmington Road relies (set forth above), there appears to be no dispute that there were at least four transfers of the above referenced loan documents (although Farmington Road initially denied it). This is known based on recitals, statements, representations, and warranties made in a "Pooling and Servicing Agreement" executed on February 8, 2005 between, among others, Structured Asset Securities Corporation II ("SASC II") and the Trust. ***Refer to*** **Supplemental Brief in Support of Motion for Preliminary Injunction, Exhibit 14; and Petitioner's May 27, 2010 Motion for Reconsideration, Exhibit 13 (District Court Docket Number 30)**. These are the transfers that are known to have occurred:

1. At some point after the Mortgage was executed, Lehman Brothers assigned the loan documents to Lehman Brothers Holdings, Inc. ("LBHI"). This assignment is not recorded with the Register of Deeds.

2. On or about January 31, 2005, LBHI assigned the loan documents to SASC II. This assignment is not recorded either.

3. Pursuant to Schedule II(iii) of the Pooling and Servicing Agreement, and as of February 8, 2005, SASC II warranted that it was the owner of the Mortgage and other loan documents, had good title to same, and had the power to sell, assign, and transfer the loan documents.

4. As of the date of the Pooling and Servicing Agreement (February 8, 2005), the Trust was created. Sometime thereafter, SASC II assigned the loan documents to the Trust pursuant to a Mortgage Loan Purchase Agreement (that Farmington Road refuses to produce). Like the prior assignments, this assignment is not recorded.

5. Finally, on March 3, 2010, the Trust purported to assign the loan documents to Farmington Road. The assignment was recorded with the Register of Deeds on March 4, 2010.

Therefore, at this stage, it appears that this is the contract chain:

Date	Ass'or	Transfer	Assignee	Recorded?
12/30/ 2004	Liv. Props.	Mortgage on property	Lehman Brothers	Yes
12/31/ 2004 and 1/30/ 2005	Lehman Brothers Bank	Assignment of Mortgage	LBHI	No
1/31/ 2005	LBHI	Mortgage Loan Purchase Agreement	SASC II	No
On or after 2/8/ 2005	SASC II	Assignment of Mortgage	Trust	No
3/3/ 2010	Trust	Assignment of Mortgage	Farming. Road	Yes

As can be seen, three of these transfers have not been recorded. Not specified in the table is one of the two assignments on which Farmington Road relies – Lehman Brothers to the Trust. While recorded, it is nevertheless a nullity, not only because it was assigned in blank to an entity that did not exist (the Trust), and was assigned at a time when Lehman Brothers no longer owned the Mortgage.

Despite all of the above, on June 16, 2010, Farmington Road proceeded with the foreclosure by advertisement of three of the four parcels (with itself as the high bidder). It is believed that the fourth parcel has yet to be sold.

SUMMARY OF THE ARGUMENT

Based on Michigan's foreclosure by advertisement statute and case law interpreting same, Farmington Road may not foreclose the Mortgage by advertisement, because all of the assignments leading to Farmington Road were not recorded in the record chain of title and one of the assignments on which Farmington Road relies conveyed nothing at all. Under these circumstances, Farmington Road may only resort, if at all, to a traditional judicial action to foreclose the Mortgage. Because Farmington Road has not done that, a preliminary injunction enjoining the foreclosure by advertisement should have been issued. Livonia Properties therefore requests an order voiding the deeds with regard to the three properties that were sold and an order providing that any foreclosure of the properties be enjoined during the duration of the litigation in the District Court.

This case is at the same time ordinary and extraordinary. Ordinary because the banking industry, foreclosure mills, special servicers, and single purpose entities have now made it regular business practice to ignore ordinary principles of contract and assignment law in favor of sloppy transactions. Extraordinary because these entities treat mortgagors (in the toughest economic climate in generations) like deadbeat lawbreakers, and as if the property in which they live and make their livelihoods is insignificant – and worst of all, because so few courts have been willing to step into the thicket to put a stop to it and hold these entities accountable, ignoring property owners' basic due process rights in favor of the finance industry's dismissive mantra that "this is how we do things."

This Court can and respectfully should step into this thicket to put a stop to these practices. And send a clear message to these entities that the era of business as usual is over; and that they, too, are required to justify their chain of ownership before they can take away people's property.

ARGUMENT

MCL 600.3201, *et. seq.* regulates the manner in which a private party may proceed with the streamlined foreclosure by advertisement method (as opposed to the traditional method of judicial foreclosure). The provisions of the statute are automatically part of any mortgage contract: "The theory underlying Michigan's foreclosure by advertisement scheme is that the provisions of the foreclosure by advertisement statute, MCL 600.3201 *et seq.*; MSA 27A.3201 *et seq.*, become a part of the contract between the mortgagor and the mortgagee." *Manufacturers Hanover Mortg. Corp. v. Snell*, 142 Mich. App. 548, 553; 370 N.W.2d 401 (1985).

The material provision for purposes of this appeal is MCL § 600.3204(3), which provides:

> If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage.

Farmington Road is not the original mortgagee. Therefore, all of the assignments *evidencing* the assignment from the original mortgagee (Lehman

Brothers) to Farmington Road needed to be recorded with the Register of Deeds before the foreclosure process was initiated. As set forth above, all assignments, by admission of Farmington Road, have not been recorded.

The fact that all the assignments have not been recorded is decisive. The Michigan Supreme Court has consistently held that "The statute concerning foreclosure by advertisement . . . requires as a condition precedent to that procedure a recording of the mortgage, ***and all assignments***." *Arnold v. DMR Financial Services*, 448 Mich. 671, 677 & n.7; 532 N.W.2d 852 (1995), quoting *Feldman v. Equitable Trust Co.*, 278 Mich. 619, 625; 270 N.W. 809 (1937) (emphasis added). Indeed, the Michigan Supreme Court has used strong language in construing this statute, and has required strict compliance with the foreclosure statute: "The right to foreclose by advertisement is conferred solely by the statute, and its provisions must be strictly complied with." *Dohm v. Haskin*, 88 Mich. 144, 147; 50 N.W. 108 (1891). *See also Feldman v. Equitable Trust Co.*, 278 Mich. 619, 623; 270 N.W. 809 (1937). And with direct relevance to this case, the Michigan Supreme Court has held:

> This is not a requirement of supertechnical niceties and details of description. It means only that, the ordinary rules of evidence and interpretation considered, if the record, without the aid of extraneous evidence, does not put the title of the assignee of a mortgage beyond doubt, he cannot foreclose by advertisement. If he cannot remedy the defects in the record, he must resort to foreclosure by action.

Arnold, 448 Mich. at 677 & n. 7. In this way, the Michigan Supreme Court could not be clearer: All assignments means all assignments. Here, the only way to put Farmington Road's "title beyond doubt" is to examine the three aforementioned, unrecorded transfers; which, because they are unrecorded, requires the aid of evidence extraneous to the public record.

Indeed, not only are at least three assignments not recorded with the Register of Deeds, but of the two assignments on which Farmington Road relies, one of them, the purported Assignment from Lehman Brothers Bank to the Trust – which, while recorded with the Register of Deeds – is of no legal significance; because it is known that when Lehman Brothers assigned the loan documents *to* the Trust, Lehman Brothers had already and previously assigned the loan documents to LBHI. Therefore, the first assignment in the "record chain" was executed at a time when Lehman Brothers had no legal interest to *give* the Trust – because the Trust did not even exist until February 8, 2005. So assuming that the assignment was effective on February 8, 2005 at the earliest, the Mortgage had already been assigned to LBHI; and in fact, as of February 8, 2005, SASC II was warranting to everyone that SASC II owned the Farmington Road loan documents.[1]

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[1] This is in addition to the fact that the assignment was executed in blank, filled in later with a stamp by some unknown person (who may not have had the authority to assign for Lehman Brothers), in an area of the assignment the parties designated to be intentionally left blank; at a time when the purported assignee, the Trust, did not exist (in the face of Michigan law which requires a present intent to transfer). *See also U S. Bank Nat'l*

The assignments that *should* have been recorded with the Register of Deeds – the assignments from: Lehman Brothers to LBHI; from LBHI to SASC II; and from SASC II to the Trust (referenced in the Table above) – none of these assignments have been recorded, and yet *these* are the transfers through on which Farmington Road must be relying "evidencing the assignment of the mortgage to the party foreclosing the mortgage" and to establish that Farmington Road has the Mortgage contract right to foreclose by advertisement.

Farmington Road has argued that the assignment mess is cured and its Mortgage rights nonetheless established by the fact that it possesses the Note (based on a legal theory that a mortgage follows indorsement of the note). While that could possibly cure the issue in a *judicial* foreclosure, that would not cure the issue in a foreclosure by *advertisement*, based on the statute's requirement of recordation of all assignments. The argument fails for another reason as well. While mortgages may follow the note, the parties may "agree otherwise." RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 5.4 (1997) ("A transfer of an obligation secured by a mortgage also transfers the

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Assoc., as Trustee for the Structured Asset Securities Corporation Mortgage Pass Through Trust v Ibanez, et. al., 08 MISC 384283; 17 LCR 679, 687; 2009 Mass. LCR Lexis 134 (Mass. Land Court October 14, 2009) ("Here, the only entities authorized by the mortgages to exercise the power of sale contained therein are the original mortgagees and the valid assignees of those mortgagees The plaintiffs were neither at the time of notice and sale because, as discussed above, there had never been an assignment of the mortgage to them. The blank mortgage assignments they possessed transferred nothing ")

mortgage unless the parties to the transfer agree otherwise."). The parties *did* agree otherwise. The Pooling and Servicing Agreement required the execution of assignments (and also the recording of them), stating that the documentation to be provided in conjunction was to include:

> an original or a copy of the Mortgage, together with originals or copies of any and **all intervening assignments therein**, in each case, (unless the particular item has not been returned from the applicable recording office), **with evidence of recording** indicated thereon.

***Refer to* id. at Exhibit 13, p. 46, definition of "Mortgage File" (emphasis added)**. Interpreting a similar Pooling Agreement (ironically involving many of these same parties), a Massachusetts court held, "assignments in recordable form to each successive entity were thus required at every step in the securitzation chain." *U.S. Bank Nat'l Assoc., as Trustee for the Structured Asset Securities Corporation Mortgage Pass Through Trust v. Ibanez, et. al.*, 08 MISC 384283; 17 LCR 679, 685; 2009 Mass. LCR Lexis 134 (Mass. Land Court October 14, 2009).[2] In holding that the mortgage therefore was owned by the originator, the court held "[T]he plaintiffs' own securitization documents show that they knew of those requirements, and if they failed to follow them, the

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[2] "I am puzzled at this since, as noted above and discussed more fully below, the plaintiffs' own securitization documents required mortgage assignments to be made to the plaintiffs in recordable form for each and every loan at the time the plaintiffs acquired them." *U.S Bank*, 17 LCR at 683 & n 22

responsibility for the consequences is theirs." *Id.* at 686.

Further support for Livonia Properties' argument is the written interpretation of this statute by Michigan's then-attorney general, which reads, in part:

> It is my opinion, therefore, that **a mortgagee cannot validly foreclose a mortgage by advertisement unless the mortgage and all assignments of that mortgage** (except those assignments effected by operation of law) are entitled to be and **have been recorded**.

Petitioner's Motion for Reconsideration, Exhibit 16 (Michigan Attorney General Opinion No. 7147 dated January 9, 2004) (emphasis added).

This is therefore the attorney general of the State of Michigan – who is charged with enforcing the laws of Michigan – which has the same opinion and interpretation of the statute as Livonia Properties. It ultimately lies with the judiciary to say what the law is, but since the individual with the responsibility to enforce the laws of Michigan holds the same opinion as Livonia Properties, Livonia Properties submits that this opinion should be entitled to significant weight. (This Court regularly solicits *amici* from attorneys general of states or the United States on an issue of law within their respective spheres). Neither the District Court nor the Circuit Court, however, addressed the attorney general's construction. In a diversity case, with the state's top attorney having directly rendered an opinion on Michigan law, Livonia Properties submits that this was an abuse of discretion.

For purposes of the request for the preliminary injunction, since at least three assignments have not been recorded,[3] Farmington Road did not have the authority to foreclose by advertisement and must, if at all, "resort to foreclosure by action." *Arnold*, 448 Mich. at 677 & n. 7. A sheriff's sale that occurs in violation of MCL § 600.3204 passes no title to the purchaser; in this case, Farmington Road (the high bidder for three properties). *See Jackson v. Laker Group, L.L.C.*, 474 Mich. 1014; 708 N.W.2d 374, 375 (2006) (Kelly, J., Dissenting), *citing Bowen v. Brogan*, 119 Mich. 218; 77 N.W. 942 (1899). Therefore, the sales of the three properties should be voided, and this Court should enter a preliminary injunction preventing the sale of the properties during the duration of the litigation.

In denying the motion for preliminary injunction, the District Court nevertheless held that a Michigan Supreme Court decision controlled the outcome in favor of allowing Farmington Road to foreclose the Mortgage by advertisement, the case of *Peterson v. Jacobs*, 303 Mich. 329; 6 N.W.2d 533 (1942), a case decided 53 years before the aforementioned *Arnold* case. **Appendix C, 36a-37a**. It is noteworthy that for all the attribution the District Court gave the *Peterson* case, *Peterson* (like *Dohm*, *supra*) held that compliance with the statutory requirements "means a strict compliance." *Peterson*, 303 Mich. at 335.

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[3] In light of the dizzying number of transfers of loan documents now-a-days, there could be more assignments We don't know yet. Farmington Road refuses to meet an confer for a Rule 26 conference to initiate discovery, and the District Court has yet to order Farmington Road to do so (this case is some seven months old).

The section of the *Peterson* opinion on which the District Court relied was that "slight and inconsequential" irregularities will not defeat the right to foreclose by advertisement. *Peterson*, 303 Mich. at 335. The reference to substantial compliance in *Peterson*, however, had to do with the *notice* required to be given to the mortgagor in a foreclosure. How do we know that? Because that was the only issue before the court. The defendant's argument in *Peterson* was "that the foreclosure proceedings were fatally defective because the assignment of the mortgage to the R.F.C. and its reassignment to defendants ***was not set forth in the notice of sale***." *Peterson*, 303 Mich. at 332 (emphasis added). In *Peterson*, the Michigan Supreme Court was responding to *that* argument:

> We are of the opinion that the mortgage sale was regular and the failure to mention the assignment [in the notice] to R.F.C. and reassignment to defendants was not such a substantial irregularity so as to vitiate the sale.

Id. at 335-36. The actual assignments *were* recorded with the register of deeds; that the *notice of sale* neglected that information was what was "slight and inconsequential." The distinction matters because no one could put the mortgagee's title "beyond doubt" in *Peterson*, because a title search with the register of deeds would reflect the transfers leading to the foreclosing mortgagee.

In this way, the *Peterson* Court was not giving mortgagees *carte blanche* to be sloppy with the public record and ignore basic elements of the foreclosure statute – like recording the assignments through which the mortgagee-assignee claims its rights. Mich.

Comp. Laws § 600.3204(3). As *Arnold* makes clear, one of the purposes of recordation as expressed by the Michigan Supreme Court is to put the foreclosing party's title "beyond doubt"; how can the foreclosing party do that if the assignments through which it claims its right to foreclose are not recorded? (Especially, as in this case, when it is known that the first assignment did not transfer any rights at all).[4] The District Court's reliance on *Peterson* and any additional *dicta* as support for its refusal to enter the injunction was an error of law.

Even if there were a "substantial compliance" exception under Michigan law (e.g., one that extends beyond the public notice provisions of the statute), this is immaterial because, as argued earlier, the Michigan Supreme Court has held that "all assignments [must be recorded]." *Arnold*, 448 Mich. at 677 & n.7. Livonia Properties submits that a defect or irregularity with regard to the recordation of the assignments of the mortgage leading to the foreclosing mortgagee is so fundamental that it could never be construed as "substantial compliance" with the foreclosure statute. *It is an element of MCL § 600.3204*. Therefore, as a matter of law, it could never be held that Farmington Road "substantially complied" with the statute because the assignments through which Farmington Road is asserting its contract rights were not recorded.

Additionally, the lower courts' interpretation that "record chain of title" only means those assignments filed in the public record – even if the record chain is *wrong* and even if additional assignments are known

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[4] *Refer supra*, n 1

to exist and should have been recorded – was an improper interpretation of the statute. That would mean that anyone could forge an assignment document and file it against the property and begin foreclosure by advertisement proceedings; and the courts of the United States would be closed to the mortgagor to stop the process.

The circularity of what is the record chain of title, in the limited interpretation by the low courts, is confounding. The record chain of title will always be exactly as it is. Shouldn't it be *correct*? Even if *Arnold* had never been decided, wouldn't *that* be the more rationale interpretation of the Michigan legislature's meaning? The recording requirements imposed by foreclosure by advertisement statute (which, incidentally, are not difficult) means very little if it does not matter if it's accurate. The Sixth Circuit nevertheless held:

> In this case, the recorded documents show a transfer from Lehman Brothers to the Trust and another from the Trust to Farmington. These transfers were found in Livonia's own title search, which Livonia offered as an exhibit in its original brief to the district court. This record shows a clear chain of title from the original mortgagee to Farmington.

Appendix A, 7a-8a. True, Livonia Properties' title search showed the purported transfer from Lehman Brothers to the Trust and the transfer from the Trust to Farmington Road. But that does not mean that the chain of title as expressed in the public record is accurate. While the chain may be "clear" or even logical – we all know it's wrong, because the Lehman

Brothers transfer to the Trust conveyed nothing. And the Trust (which later assigned its rights to Farmington Road) took its rights from SASC II – an assignment that was not recorded. Livonia Properties submits that the best and most rationale interpretation of the statute is that mortgagees may foreclose a mortgage through this streamlined, non-judicial method of advertisement if, *but only if*, the record connects all the dots showing that the right to foreclose by advertisement and that the Mortgage passes from point A to point B (and so on), leading to the foreclosing mortgagee. That gives assurance to the legislature that the party foreclosing actually has the contract right to do so. On the other hand, the lower courts' interpretation of the statute in essence eschews that purpose in favor of an interpretation that the Michigan legislature, in drafting the statute, did not care what the record says or whether it's inaccurate.

The Circuit Court's reliance on the *Arnold* case as *support* for its holding was respectfully in error as well. The statements from the *Arnold* Court are set forth substantially above and need not be repeated. The Circuit Court relied on a single statement from *Arnold* that "unrecorded interests 'did not create a valid objection on behalf of the mortgagor if the mortgagor was unaffected by those interests.' 532 N.W.2d at 856." **Appendix E, 7a-8a** The *Arnold* Court was speaking of unrecorded ***security*** interests in real estate. The assignments here were for the whole interest, not just a security interest, a fact that the Circuit Court even acknowledged. **Appendix E, 7a-8a** ("One point of distinction between *Arnold* and the present matter is that the foreclosing party in *Arnold* had assigned only a security interest in the mortgage rather than all of its rights. In contrast, the

mortgage between Livonia and Lehman Brothers appears to have passed in its entirety through two entities associated with the PSA before being titled to the Trust."). *Arnold's* limitation was only as to unrecorded security interests – not unrecorded assignments of the whole interest. Assignments of security interests need not be recorded; assignments of the whole interest *do*. Michigan law has never held otherwise.

In light of all of the above and consideration of the caselaw, the decisions of the District Court and the Circuit Court impose federalism costs because federal courts sitting in diversity, which are bound to apply state law based on state precedent under the *Erie* doctrine, are in essence creating a body of federal common law with regard to interpretations of Michigan statute and Michigan cases; regardless of the decisions of the Michigan Supreme Court. Had this case remained in the state system, Livonia Properties submits that based on the discussion above, Livonia Properties would have been successful in its prayer for injunctive relief. The State Court's entry of the broad Temporary Restraining Order is at least some evidence of that.

On a final point, in an era where mortgage factories and special servicers have run amok, where sloppiness is the rule and not the exception, where loan documents are assigned (often in blank, as in this case) multiple times, and oftentimes even the banks don't know where loan documents are, it is a crisis that more and more courts have closed the judicial doors on mortgagees to challenge the standing of the foreclosing mortgagee. In a case where it is known for certain that the public record is wrong (e.g., the Trust did not

take its rights from Lehman Brothers Bank; it took rights from SASC II), where assignments are in blank, when assignments are created to entities that don't exist, when assignments are back-dated – for the lower courts in this case to essentially say that it is no business of the mortgagor to inquire into who owns the indebtedness and mortgage rights and to say, in essence, "we don't care" if the public record is wrong denies basic due process rights. A foreclosure by advertisement statute, like the one in Michigan, is reserved for clean and clear assignments of mortgages, and for mortgagees who can point to the public record and truthfully connect the dots to the foreclosing mortgagee. Farmington Road cannot do that.

For what it's worth, Farmington Road has a remedy: it can begin a judicial foreclosure proceeding.[5] These foreclosure mills, however, don't want to do that because they know their paperwork is often a mess, a fact which has surfaced more publicly in the past year (e.g., Bank of America's temporary moratorium on foreclosures). "[B]ecause of the careless--some might say 'reckless'--behavior seemingly endemic to the mortgage industry and entities servicing those loans, courts have been forced to expend time and resources to sort through mortgage loan histories." *In re Hudak*, Bankruptcy Case No. 08-10478-SBB; 60 Collier Bankr. Cas. 2d (MB) 1354, *11 (Bankr. D. Col. October 24, 2008). Unfortunately, these banks have convinced courts, perhaps out of the mind-numbing complexity of

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[5] Or Farmington Road could record the interim assignments, like the one from Lehman Brothers Bank to LBHI, the one from LBHI to SASC II, and the one from SASC II to the Trust (and anything else that exists between or thereafter).

it all, to abandon examination of the trail of these assignments in favor of the aforementioned condescending mantra that "this is how it's done." Fortunately, not all courts have succumbed to the industry:

> The mortgage lender, its affiliates, assignees, and agents involved in this case, through the convoluted process of securitization, the submission of a 191-page, incomplete [Pooling and Service Agreement], and reliance upon back-dated, unrecorded assignments, have confounded the identity of the current holder of the mortgage . . . . The Court and the Debtor are entitled to insist that the moving party establish its standing in a motion for relief from stay through the submission of an accurate history of the chain of ownership of the mortgage."

In re Hayes, 393 B.R. 259, 269; 2008 Bankr. Lexis 2191 (Bankr. D. Mass. August 19, 2008). Not enough courts, however, are willing to hold the big banks accountable, including the courts in which Livonia Properties is a party. We have in essence been denied substantive judicial review of the process of these transactions – by which we are affected – and denied any discovery or even the right to inquire into these matters. Mortgagors are the victims of this Wild West. Just because "Too-Big-To-Fail" banks are involved should not result in what is too often ending in rubber stamp justice.

As stated earlier, this case is ordinary and extraordinary, and is exactly the type of case over which this Court should exercise jurisdiction to

address systemic problems in the mortgage industry in connection with the transfers and assignments of mortgages.

CONCLUSION

For the foregoing reasons, Petitioner Livonia Properties Holdings, L.L.C. respectfully requests that the Court grant its petition, and issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 10-1782

[Filed October 28, 2010]

LIVONIA PROPERTIES HOLDINGS, LLC,

Plaintiff-Appellant,

v.

12840-12976 FARMINGTON ROAD HOLDINGS, LLC,

Defendant-Appellee.

BEFORE: MERRITT, ROGERS, and SUTTON, Circuit Judges.

ROGERS, Circuit Judge. Plaintiff Livonia Properties Holdings, L.L.C. appeals the district court's denial of a request for a preliminary injunction of the foreclosure by advertisement of four properties for which Livonia had defaulted on its mortgage

obligations. The district court denied the request for a preliminary injunction after determining that Livonia did not have a strong likelihood of success on the merits, Livonia was not likely to suffer irreparable harm without the injunction, any harm caused to Livonia by refusing to enjoin the foreclosure did not clearly outweigh the harm to others that would be caused by enjoining the foreclosure, and an injunction would not serve the interests of public policy. An evaluation of the preliminary injunction factors shows that the court did not abuse its discretion in denying the injunction.

Livonia owns (or recently owned) four commercial properties in Livonia, Michigan. In December 2004, Livonia used these properties to secure a $16,300,000 commercial mortgage loan with Lehman Brothers Bank, FSB. Lehman Brothers executed an assignment of the loan on or around January 6, 2005, effective January 11, 2005 (the "First Assignment"). The assignment documents show that the loan was transferred from Lehman Brothers to LaSalle Bank National Association as Trustee for the registered holders of LB-UBS Commercial Mortgage Trust 2005-C-1, Commercial Mortgage Pass-Through Certificates, Series 2005-C1 (the "Trust"). The First Assignment was recorded with the Wayne County Register of Deeds on November 17, 2005.

The public record shows only an assignment from Lehman Brothers to the Trust. However, Livonia has provided evidence that the First Assignment was actually accomplished through a series of interim, short-term transfers rather than a direct transfer between the parties. These transfers have been

acknowledged by defendant, Farmington Road Holdings, and are as follows:

1. On or about January 6, 2005, effective January 11, 2005, Lehman Brothers sold the loan to Lehman Brothers Holdings Inc. ("LBHI");

2. On or about January 31, 2005, LBHI transferred the loan to Structured Asset Securities Corporation II ("SASCII");

3. On or about February 10, 2005, SASCII deposited the loan into the Trust.

Livonia discovered these interim assignments through an Internet search that revealed a Pooling and Servicing Agreement ("PSA") describing the interim transfers that were used to establish the Trust. Farmington acknowledged at oral argument that the First Assignment was executed "in blank" (to be completed later) and was later completed to identify the Trust as Lehman Brothers' assignee.

On February 17, 2010, the Trust created the defendant entity, Farmington, for the purpose of foreclosing on the mortgaged properties. The trustee assigned the loan to Farmington on or about March 3, 2010 (the "Second Assignment"). The Second Assignment was recorded with the Wayne County Register of Deeds on March 4, 2010. Farmington then began the process of foreclosure by advertisement, a method of non-judicial foreclosure permitted under Michigan law. Mich. Comp. Laws Ann. § 600.3204. Livonia contested the foreclosure in Michigan state court, and Farmington removed the matter to federal court. The district court extended the state court's

grant of a temporary restraining order while considering Livonia's motion for a preliminary injunction.

On appeal, Livonia contends that Farmington is not in compliance with the statute's requirement that a foreclosing mortgagee who is not the original mortgagee must hold record chain of title to the property in question. The basic assertion is that because the interim transfers of January 2005 were never recorded, the record chain of title is defective and Farmington cannot foreclose on the properties by advertisement. The district court correctly determined that Livonia did not have a strong likelihood of success on the merits of its record-chain-of-title claim and dissolved the TRO. Livonia next filed a motion for reconsideration, which the district court denied. Farmington has sold three of the four properties pursuant to the foreclosure by advertisement statute. Livonia now appeals.

As an initial matter, Farmington contends that Livonia's request that the sales that have already occurred be set aside is not properly before this court. Farmington argues that the request was not before the district court on the motion for preliminary injunction, but Farmington does not acknowledge that the TRO barred foreclosure, so there were no sales for the district court to set aside. All of the relevant issues of law required to award either form of relief, an injunction or voiding of the sales, were presented below, and Livonia has not modified those claims on appeal. Livonia is not attempting to introduce a new claim on appeal, but has merely adjusted the form of relief requested to conform to the current

circumstances. The request has been properly presented to this court.

Farmington also contends that Livonia's petition is partially moot because three of the four mortgaged properties have already been sold through the foreclosure by advertisement process, but this argument is also without merit. Farmington's sole support of its position is a quote taken out of context from Wright's *Federal Practice and Procedure* treatise, which states that "[i]f the district court has denied an injunction and there has been no stay, defendant is free to take the action sought to be enjoined, and if the event sought to be enjoined transpires before the appeal is heard, the appeal will be dismissed as moot." 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2904. We have found no additional support for this proposition, and Farmington has not argued that we would be unable to provide Livonia any relief in this appeal. *See Coalition for Gov't Procurement v. Fed. Prison Indus.*, 365 F.3d 435, 460 (6th Cir. 2004) ("the determinative factor in the mootness inquiry is whether the court possesses the authority to afford [the party seeking reversal] any effectual relief").

The key issue on appeal is the meaning of "record chain of title" under Michigan's foreclosure by advertisement statute. Mich. Comp. Laws Ann. § 600.3204. The relevant statutory language states: "[i]f the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale . . . evidencing the assignment of the mortgage to the party foreclosing the mortgage." Mich. Comp. Laws Ann.§ 600.3204(3). Livonia contends that because the PSA was never recorded and two parties to the PSA are not reflected

in the recorded documents, the record-chain-of-title requirement is not satisfied. Livonia's basic assertion is that a Michigan mortgage may only be foreclosed by advertisement if every interim assignment between the original lender and the foreclosing party is revealed by the public record. Livonia's interpretation, however, is not in accordance with the case law.

Livonia offers no definition of the term "record chain of title" and interchanges the phrase with "chain of title" throughout its brief. A search of Michigan case law and property treatises has not revealed a definition of either term, but the phrase is plain on its face and was reasonably defined by the district court in its opinion denying Livonia's motion to reconsider: "record chain of title is comprised of documents that were filed in the County Register of Deeds' office."[1]

In this case, the recorded documents show a transfer from Lehman Brothers to the Trust and another from the Trust to Farmington. These transfers were found in Livonia's own title search, which Livonia offered as an exhibit in its original brief to the district court. This record shows a clear chain of title from the

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[1] Farmington's appellate brief refers to an affidavit of Dennis W. Hagerty, a 23-year member of the Land Title Standards Committee of the Real Property Law Section of the State Bar of Michigan in which Mr. Hagerty explains the meaning of the term "record chain of title." Livonia contends that this affidavit is not properly considered by this court because it was not before the district court at the time that court ruled on the preliminary injunction. There is no need to examine Livonia's claim on this point because the Hagerty affidavit is not necessary to a determination of the meaning of "record chain of title" and was not relied on by this court in determining the meaning of the phrase.

original mortgagee to Farmington. Although Livonia has not articulated any alternative definition of "record chain of title," its argument clearly rests on the position that the term includes any and all interests in the property ever held by any individual or entity. This position is not supported by the case law.

The most recent Michigan case in which a plaintiff has attempted to challenge a foreclosure by advertisement based on unrecorded assignments is *Arnold v. DMR Financial Services, Inc* , 532 N.W.2d 852 (Mich. 1995). In that case, DMR, the financial institution foreclosing on the mortgage, had granted a security interest in the mortgage to another entity, which did not record its interest. The foreclosed party argued that the foreclosure was not carried out in accordance with the statute because the security assignment was not within the chain of title. The Michigan Supreme Court disagreed, restating its long-held position that "the presence of an unrecorded security assignment was irrelevant." *Id.* at 856. *Arnold* actually involved a prior version of the foreclosure-by-advertisement statute that said that *all* assignments must be recorded. *Id.* at 855. Even under that stronger language, which is clearly more favorable to Livonia's position than the current requirement that the foreclosing party have "record chain of title," the Michigan Supreme Court was clear that the lack of recordation did not invalidate the foreclosure.

One point of distinction between *Arnold* and the present matter is that the foreclosing party in *Arnold* had assigned only a security interest in the mortgage rather than all of its rights. In contrast, the mortgage between Livonia and Lehman Brothers appears to have passed in its entirety through two entities

associated with the PSA before being titled to the Trust. However, this distinction does not undermine *Arnold*'s relevance to the case at hand. The *Arnold* court emphasized that unrecorded interests "did not create a valid objection on behalf of the mortgagor if the mortgagor was unaffected by those interests." 532 N.W.2d at 856. Livonia has not argued that the intermediate transfers related to the PSA have in any way affected Livonia's rights or responsibilities related to the mortgage. In fact, it appears that the only interests impaired by the lack of recordation were those of LBHI and SASCII during the brief time those entities held the loan. Had either attempted to foreclose, Livonia would have had a valid record-chain-of-title objection.

The district court opinion emphasizes that Farmington at least substantially complied with the statutory requirements for record chain of title and that substantial compliance is all that is required under the statute. *Livonia Prop. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC*, No. 10-11589, 2010 WL 1956867, at *16-18 (E.D. Mich. May 13, 2010). Livonia argues that the district court misinterpreted the law because the statute actually requires strict compliance. The case law supports the district court's position that substantial compliance is sufficient. *Peterson v. Jacobs*, 6 N.W.2d 533, 536 (Mich. 1932). However, the issue does not require further discussion because Farmington appears to be in full compliance with the statute. Both Farmington and Livonia have produced documents revealing that the public records show the mortgage passing from Lehman Brothers to the Trust to Farmington, and the plain language of the statute appears to require nothing more.

Livonia also asserts that Farmington must prove that the assignment between Lehman Brothers and the Trust is legally valid in order for Farmington's chain of title to be valid. Livonia contends that the assignment from Lehman Brothers to the Trust may be invalid because the Trust did not actually exist as of January 6, 2005, the date entered on the transfer instrument. Livonia bases this claim on the PSA, which created the Trust but was not executed until February 8, 2005. The argument, as articulated on appeal, is that the Trust could not have actually received the mortgage on January 6, 2005, and as a result, the assignment was invalid, making the record chain of title invalid. As a preliminary matter, Livonia has presented no authority for the proposition that the record chain of title is destroyed by an irregularity affecting the validity of a transfer. Even if the transfer were invalidated, the public record would remain as it is, and the record chain of title would not be disturbed.

Regardless of this point, even if there were a flaw in the assignment, Livonia does not have standing to raise that flaw to challenge Farmington's chain of title. As recognized by the district court, there is ample authority to support the proposition that "a litigant who is not a party to an assignment lacks standing to challenge that assignment." 2010 WL 1956867, at *9. An obligor "may assert as a defense any matter which renders the assignment absolutely invalid or ineffective, or void." 6A C.J.S. *Assignments* § 132 (2010). These defenses include nonassignability of the instrument, assignee's lack of title, and a prior revocation of the assignment, none of which are available in the current matter. *Id.* Obligors have standing to raise these claims because they cannot otherwise protect themselves from having to pay the

same debt twice. *Id.* In this case, Livonia is not at risk of paying the debt twice, because Farmington has established that it holds the original note. Farmington has produced ample documentation that it was in possession of the note and had been assigned all rights therein prior to the initiation of foreclosure proceedings. The district court reviewed the copies in exhibits and the originals produced by Farmington and was satisfied that they were authentic. Without a genuine claim that Farmington is not the rightful owner of the loan and that Livonia might therefore be subject to double liability on its debt, Livonia cannot credibly claim to have standing to challenge the First Assignment.

Michigan case law provides further support for the district court's conclusion that Livonia lacks standing to challenge the assignment. In *Bowles v. Oakman*, 225 N.W. 613 (Mich. 1929), the Michigan Supreme Court held that the maker of a promissory note could not challenge his obligations under the note by asserting that an invalid assignment had occurred. *Id.* at 614. The court emphasized that the challenge to the transfer was inappropriate where the maker "had no defense of his own to the note." *Id.* The *Bowles* decision then quotes *Gamel v. Hynds*, 125 P. 1115 (Okla. 1912), for the point that "the maker cannot defend or set up matters of defense which only exist between the indorser and indorsee." 225 N.W. at 614. More recently, the Michigan Court of Appeals determined that a lessee of property did not have standing to challenge the lessor's assignment of certain rights in the lease to a subsequent purchaser because "the parties to the assignment . . . [did] not contest its validity." *Pashak v. Interstate Highway Constr.*, No. 189886, 1998 WL 2001203, at *1 (Mich. App. Mar. 20,

1998). In the instant case, if the assignment were in fact irregular, that would be an issue between the assignor and assignee, not between Livonia and Farmington.

Livonia has attempted to distinguish itself from the unsuccessful obligors described above by emphasizing that its challenge of the First Assignment is not meant to "challenge the underlying obligation," but rather to challenge the record chain of title. That is, Livonia contends that a defective assignment corrupts the record chain of title and that Livonia's challenge is only of Farmington's standing to foreclose under the statute. Livonia's brief cites several cases in which obligors have raised chain of title challenges (often unsuccessfully) for the proposition that Livonia has standing to assert this claim. Livonia further argues that because the statute requires the foreclosing party to hold record chain of title, a debtor must be able to challenge the record chain of title as a means of avoiding foreclosure. Livonia is correct that a party subject to foreclosure has standing to challenge whether a lender holds record chain of title, but that determination is limited to an examination of the public records. In its opinion on Livonia's motion to reconsider, the district court clarified this difference, pointing out that Livonia "acknowledges that a *record chain of title* exists" but is "unsatisfied with the *record chain of title*." 2010 WL 1956867, at *18. Because Livonia finds no claim in the public records, it is seeking to "go beyond the statutory requirements to inspect each and every aspect of every contract or agreement" in the history of the loan. *Id.* at *16.

As noted by the district court, even if Livonia did have standing to contest the First Assignment and the

assignment were in fact invalid, Livonia would still be unlikely to succeed on the merits. 2010 WL 1956867, at *10. Any claim by Livonia that Farmington or the Trust before it was not a valid assignee of the mortgage rings hollow, as Livonia made mortgage payments directly to the Trust for years without questioning the Trust's right to receive payment. Further, when Livonia first encountered difficulties in repayment, it entered into a prenegotiation agreement with the Trust. Standing alone, the existence of that agreement makes Livonia's current questioning of the mortgage's ownership or assignments appear disingenuous, but the agreement's specific terms further weaken the claim. In the agreement, Livonia expressly acknowledged that "[t]he Loan Documents are in full force and effect and are binding on the Borrower in accordance with their terms." R.16-19 at 3. Even if Livonia had standing, therefore, Farmington would likely have valid equitable defenses of estoppel and laches based on Livonia's prior actions.

Livonia also alleges that the district court relied on a clearly erroneous finding of fact in denying the injunction. Livonia places great emphasis on the fact that the original district court opinion identified SASC as a party to the PSA, 2010 WL 1956867, at *1, when the actual party was in fact SASCII, a separate entity. Livonia "submits that this error by the District Court warrants reversal of its denial of [Livonia's] request for a Preliminary Injunction because there is no evidence that exists that demonstrates the actual chain of title." But, as already discussed, there is evidence of the record chain of title, some of which Livonia itself provided in the form of the title report. The district court properly relied on this evidence in considering Livonia's likelihood of success on the merits.

Livonia does not assert, and there is no evidence in the district court opinion, that the court relied in any way on the identity of SASC or SASCII in its decision to deny the injunction. Livonia brought the error to the district court's attention in its motion for reconsideration, and the district court acknowledged and disposed of the point in its opinion on that motion. The district court restated its position that Livonia lacked standing to challenge the interim transfers, recorded or unrecorded, regardless of what entities were involved. The district court's interpretation of the statute supports the conclusion that the court did not rely on the identities of specific interim parties in determining that an injunction was unwarranted. The district court correctly rejected all of Livonia's claims regarding "record chain of title," and properly concluded that Livonia had little likelihood of success on the merits.

Further, the district court's weighing of the other three preliminary injunction factors did not constitute an abuse of discretion. Livonia has limited its specific assertions on appeal to claims related to its likelihood of success on the merits and has not alleged any error in the district court's analysis of the other three factors. Review of the opinion reveals no such error, much less the clear error required to find an abuse of discretion.

The district court found that Livonia was unlikely to suffer irreparable harm as a result of the denial of the preliminary injunction. It specifically identified two bases for its conclusion, neither of which is clearly erroneous. First, it concluded that the alleged harms Livonia would suffer from foreclosure were the direct result of Livonia's default on the loan and emphasized

that self-inflicted harm is not the type that injunctions are meant to prevent. 2010 WL 1956867, at *12 (citing 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2948.1). Second, the court noted Michigan's statutory right of redemption, which allows a borrower subject to foreclosure to satisfy the debt and reclaim the property for six months after the sale. Because Livonia would still have the redemption right, any harm it might suffer from foreclosure was not irreparable. 2010 WL 1956867, at *13.

With regard to whether an injunction would cause harm to others, the district court determined that Livonia had not shown that any harm it would suffer if the injunction were denied would decidedly outweigh any harm that granting the injunction would cause to Farmington. *Id.* The district court did not put substantial weight on this factor because the court considered the first and second factors to be "critical" in the injunction determination and had found that both factors pointed against granting an injunction. Livonia has not referred to any evidence of harm that the district court failed to consider, and there is no clear error in its conclusion regarding the relative harms or its weighing of this factor.

The district court concluded that the public policy factor weighed against granting an injunction because Livonia had contractually agreed to foreclosure by advertisement in the event of default. *Id.* The court's conclusion that public policy does not favor allowing a borrower to avoid its contractual obligations, particularly "where it cannot satisfy the other [preliminary injunction] factors," *id.* at *13, did not rely on any erroneous findings of fact or misapplication of law and does not constitute an abuse of discretion.

We therefore affirm the district court's order denying a preliminary injunction.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 10-1782

[Filed June 15, 2010]

LIVONIA PROPERTIES HOLDINGS, LLC,	)
	)
Plaintiff - Appellant,	)
	)
v.	)
	)
12840-12976 FARMINGTON ROAD HOLDINGS, LLC,	)
	)
	)
Defendant - Appellee.	)
	)

ORDER

Before: BOGGS and KETHLEDGE, Circuit Judges; GRAHAM, District Judge.*

Livonia Properties Holdings, LLC ("Livonia"), appeals the district court's order denying its motion for a preliminary restraining order and dissolving a

* The Honorable James L. Graham, United States District Judge for the Southern District of Ohio, sitting by designation.

temporary restraining order issued by the state court from which this action was removed. In an emergency motion, Livonia asks this court to set aside that order and to enjoin a foreclosure by advertisement that is scheduled to occur on June 16, 2010. The defendant and initiator of the foreclosure proceedings, 12840-12976 Farmington Road Holdings, LLC ("Farmington"), opposes the motion.

Given the constraints of time, we consider Livonia's motion as one for an injunction pending appeal. Such an injunction is within this court's power to grant. *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 572 (6th Cir. 2002). "In granting such an injunction, the Court is to engage in the same analysis that it does in reviewing the grant or denial of a motion for a preliminary injunction." *Id.* We examine four factors: "(1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction." *Id.* at 573. *See also Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (6th Cir. 2002).

Upon consideration, we decline to enter an injunction. Livonia's harm is economic and thus does not support an injunction. *Overstreet*, 305 F.3d at 578. Further, the Michigan period for redemption following a foreclosure also leads to a conclusion that Livonia's harm is not irreparable. In any event, the harm flows from Livonia's default, not the foreclosure. As to the likelihood of success, an applicant for a stay or injunctive relief "is always required to demonstrate

more than the mere 'possibility' of success on the merits." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (citation omitted). Upon review and consideration, we cannot conclude that Livonia has done so.

Therefore, the emergency motion for injunctive relief is **DENIED**. The clerk is directed to expedite the briefing and submission of this appeal.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 10-11589
Hon. John Feikens

[Filed May 13, 2010]

LIVONIA PROPERTY HOLDINGS, L.L.C.,	)
	)
Plaintiff,	)
	)
v.	)
	)
12840-12976 FARMINGTON ROAD HOLDINGS, L.L.C.,	)
	)
	)
Defendant.	)
	)

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND DISSOLVING TEMPORARY RESTRAINING ORDER

I. PROCEDURAL HISTORY

This matter is before the court on Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction. The case was initially filed in the Circuit

Court for the County of Wayne, Michigan, Case No. 10-004441-NZ. Judge John H. Gillis Jr. issued a Temporary Restraining Order ("TRO") on April 15, 2010, and scheduled a hearing for April 21, 2010 to determine whether a preliminary injunction should issue. On April 20, 1010, Defendant Lender properly removed the action to this court on diversity grounds. I extended the effect of the TRO to May 14, 2010, scheduled a hearing for May 13, 2010, and requested supplemental briefing on certain questions. The matter has been fully briefed and a hearing was held on May 13, 2010.

II. MATERIAL FACTS

A. The Original Mortgage And Note To Lehman Brothers

On December 2, 2004, Plaintiff Livonia Properties Holdings, L.L.C. ("Borrower") entered into a $16,300,000 Commercial Mortgage Loan (the "Loan") from Lehman Brothers Bank, FSB ("Lehman Brothers"). The Loan was secured by a Mortgage on four industrial properties in Livonia, Michigan (the "Properties"). The documents executed and delivered by Borrower in connection with the Loan include, but are not limited to, a Promissory Note (the "Note"), Mortgage, and Cash Management Agreement (collectively, the "Loan Documents").

The Loan was disbursed on December 30, 2004, leaving over $5.5 million dollars for Borrower after other disbursements.

B. The Initial Assignment(s) To The Trust

On or about January 6, 2005, effective January 11, 2005, Lehman Brothers executed an assignment of the Loan Documents (the "First Assignment"). Borrower alleges, and Lender appears to concede, that the First Assignment was actually accomplished by way of three interim transfers, occurring over approximately one month:

1. On or about January 6, 2005, effective January 11, 2005, Lehman Brothers sold the Loan to Lehman Brothers Holdings Inc. ("LBHI");

2. On or about January 31, 2005,[1] LBHI transferred the Loan to Structured Asset Securities Corporation ("SASC");

3. On or about February 10, 2005,[2] SASC deposited the Loan into the Trust (as defined below).

Ultimately, the Loan Documents were assigned to LaSalle Bank National Association, as Trustee for the registered holders of LB-UBS Commercial Mortgage Trust 2005-C1, Commercial Mortgage Pass-Through

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[1] According to certain representations in a Pooling and Servicing Agreement ("PSA") effective as of January 11, 2005 (executed February 8, 2005), the transfer from LBHI to SASC occurred pursuant to a Mortgage Loan Purchase Agreement dated January 31, 2005 The PSA established the Trust and provided for SASC's deposit of certain Loans thereto.

[2] The PSA indicates that the Trust's pass-through certificates were to be issued on February 10, 2005.

Certificates, Series 2005-C1 (the "Trust"). The documents executed and delivered by Lehman Brothers in connection with the First Assignment include, but are not limited to, an Allonge, an Assignment/Transfer of (Lien of) Mortgage/Deed to Secure Debt/Beneficial Interest Under Deed of Trust ("First Mortgage Assignment"), and an Assignment of Mortgage Loan Documents (collectively, the "First Assignment Documents").

It does not appear that separate assignments were executed to reflect each interim transfer. Instead, the First Assignment Documents, including the First Mortgage Assignment and the Allonge, list Lehman Brothers as Assignor and the Trust as Assignee. Lender suggests that the assignments were executed "in blank" – apparently contemplating the ultimate assignment to the Trust – and later filled in to identify the Trust as the Assignee.

The First Mortgage Assignment was recorded with the Wayne County Register of Deeds on November 17, 2005.

As discussed more fully below, Borrower argues that the missing interim assignments (reflecting LBHI and SASC as assignees) render the "record chain of title" fatally defective and preclude foreclosure by advertisement by any party.

C. Borrower's Payment History

Beginning in February 2005, Borrower made over $5,000,000 in payments to the Trust, until its default in October, 2009. During this time, Borrower never questioned the validity of the First Assignment.

D The Prenegotiation Agreement

On December 22, 2009, Borrower entered into a Prenegotation Agreement with the Trust. In the Agreement Borrower expressly acknowledged that (a) the Trust was the Holder of the Loan Documents; (b) the Loan Documents "are in full force and effect and are binding on the Borrower in accordance with their terms"; (c) "the Loan Documents continue to constitute Borrower's legal and enforceable obligations; and (d) Borrower "currently holds no claim against Holder . . . by virtue of any action(s) or inaction(s) of Holder or any of its predecessors-in-interest, if any."[3]

E. The Loan Acceleration

On January 14, 2010, due to Borrower's default, the Trust accelerated the maturity of the Note and invoked the default rate of interest, effective as of October 12, 2009. As of January 10, 2010, the amount due and owing on the Loan was $17,846,855.93, including principal, interest, prepayment consideration and late charges.

F. The Assignment To Defendant Lender

On February 17, 2010, the Trust created the Defendant entity ("Lender"). The Loan Documents

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[3] Borrower questions Lender's "poor judgment" in attaching the Agreement, claiming it is confidential for all purposes. The court reads the Agreement to indicate that the content of any negotiations pursuant to this document are confidential, but Borrower cannot avoid the waivers and admissions made within the document itself.

were assigned to Lender on or about March 3, 2010 by way of, among other documents, a Second Allonge, an Assignment of Mortgage, a General Assignment, and an Assignment of Claims (collectively, the "Second Assignment Documents").

The Assignment of Mortgage (the "Second Mortgage Assignment"), listing the Trust as Assignor and Lender as Assignee, was recorded with the Register of Deeds on March 4, 2010.

Before the hearing on this matter, Lender produced the originals of the Loan Documents, the First Assignment Documents, and the Second Assignment Documents.

G. The Cash Management Agreement

Under the terms of the Cash Management Agreement, Borrower pledged substantial cash reserves to be held so long as a certain judgment remained unpaid. The agreement was to terminate upon notice to Lender that the judgment was deemed satisfied by a court of competent jurisdiction.

On March 1, 2010, a judge ordered that the judgment was satisfied. On March 4, 2010, Borrower provided notice of satisfaction to Lehman Brothers "and counsel for [Lender]"[4] and requested that the remaining cash reserves be immediately released to Borrower.

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[4] Again, this suggests that Borrower recognized Lender's status as assignee and holder of the Loan Documents.

Borrower claims that "in excess of $400,000" has been wrongfully withheld. Borrower also contends that, if the funds had been released, it "could have paid those monies toward the debt obligation on the Promissory Note, so that the Note would not be in alleged default, thereby not causing any alleged default on the Mortgage." According to Borrower, then, Lender would have no right to foreclose the Mortgage, by advertisement or judicial process.

Lender notes that, upon an event of default of the Mortgage (which occurred in October 2009), "Lender may apply the Collateral to the payment of the Debt in any order in its sole discretion or for such other purposes as may be authorized under the Loan Documents." Lender argues that because Borrower defaulted seven months before the judgment was satisfied, Lender was within its rights to apply the funds "in any order in its sole discretion."

H. The Foreclosure

As required by the applicable statutes, on March 24, March 31, April 7, and April 14, 2010, Lender published notices that the Properties would be foreclosed by public auction on April 22, 2010. A notice of foreclosure was also posted on each of the Properties. Borrower makes no allegations of any defect in the notice procedure.

On April 12, 2010, Borrower's counsel notified Lender's counsel that it was challenging certain aspects of Lender's right to foreclose and requesting that Lender "cease and desist from all efforts attempting to sell or convey the properties, by

advertisement or otherwise." Borrower's challenges include:

1. The Assignment from Lehman Brothers to the Trust is invalid because:

    a. there is no assignee on the face of the document[5];

    b. the person who executed the Assignment for Lehman Brothers lacked present intent to convey the documents to the Trust because the ink stamp defining the assignee was likely affixed after the assignment was executed;[6]

    c. the assignor also lacked present intent to convey the documents because Exhibit A to the assignment identifies the original mortgage recording date as January 24, 2005, eighteen days after the assignment was executed (on January 6, 2005).

2. The Assignment from the Trust to Lender is invalid because:

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[5] The space for the Assignee contains an asterisk, and at the bottom of the page, below the statement [Remainder of Page Intentionally Left Blank], the asterisk is used to define the assignee as the Trust

[6] Borrower also alleges that whomever affixed the ink stamp defining the Trust as the assignee may have lacked authority to do so.

a. Borrower has no indication that the person executing this assignment had property authority to do so.

3. The Assignment to Lender references only an assignment of the Mortgage, not the Note. Borrower demanded evidence that the Note was also assigned, and physically transferred, to Lender.

Borrower also demanded evidence that the Cash Management Agreement was assigned to Lender, an accounting history regarding the loan, and a copy of the loan application.

On April 13, 2010, Lender responded by disputing Borrower's "validity" arguments. It also offered to make "the original Note, Mortgage, Assignment of Rents, and the necessary assignments" available at the office of Lender's counsel for "the limited purpose of confirming the documents contain the appropriate original signatures." Rather than take Lender up on its offer, Plaintiff filed the instant action.

Borrower now questions the validity of the First and Second Mortgage Assignments in this proceeding. As noted above, in addition to the challenges raised in Borrower's April 12, 2010 letter, Borrower claims that the failure to record interim assignments reflecting LBHI and SASC as assignees renders the record chain of title fatally defective. Borrower states that Lender has no right to foreclosure by advertisement, and such foreclosure should be enjoined.

III. ANALYSIS

A. Standard For Granting An Injunction

The Supreme Court has stated that "[a] preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def Council*, __ U.S. ___ , 129 S.Ct. 365, 376 (2008). *See also Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002) ("A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it."); *Roghan v. Block*, 590 F. Supp. 150, 153 (W.D. Mich. 1984), *aff'd* 790 F.2d 540 (6th Cir. 1986) ("There is no power the exercise of which requires greater caution, deliberation, and sound discretion, or more dangers in a doubtful case, than the issuance of an injunction.") - (citation omitted). "[T]he proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion." *Leary v. Daeschner*, 228 F.3d 729, 739 (6th Cir. 2000). Thus, Borrower here must affirmatively demonstrate its entitlement to injunctive relief.

A plaintiff seeking a preliminary injunction must establish (1) that he has a strong likelihood to succeed on the merits; (2) that he is likely to suffer irreparable harm without the injunction; (3) that the injunction would not cause substantial harm to others; and (4) that an injunction is in the public interest. *Winter*, 129 S.Ct. at 374; *ACLU of Ky. v. McCreary County, Ky.*, 354 F.3d 438,445 (6th Cir. 2003). Although the factors are to be balanced, a finding that there is no likelihood of irreparable harm, *Winter*, 129 S.Ct. at 375, or no

likelihood for success on the merits, *Gonzales v. Nat'l Bd. of Med. Exam'rs*, 225 F.3d 620, 625 (6th Cir. 2000), is usually fatal.

B. Likelihood Of Success

To establish a likelihood of success, a plaintiff must, "at a minimum, show[ ] serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if the injunction is issued." *Six Clinics Holding Corp., II v. Cafcomp Sys , Inc.*, 119 F.3d 393, 400 (6th Cir. 1997) (quotation and citation omitted).

In Michigan, the right to foreclosure by advertisement is statutory. Such foreclosures, however, "are a matter of contract, authorized by the mortgagor, and ought not be hampered by an unreasonably strict construction of the law." *Church & Church, Inc. v. A-1 Carpentry*, 766 N. W.2d 30, 36 (Mich. App. 2008).

Borrower has raised a claim for declaratory relief with regard to Lender's standing and authority to foreclose by advertisement under M.C.L. § 600.3 204. Essentially, Borrower asserts four "defects" to Lender's right to foreclose by advertisement: (1) Lender has not provided evidence that it physically possesses the Note; (2) technical defects in the First and Second Mortgage Assignments render them invalid; (3) because two alleged assignments of the Mortgage (to LBHI and SASC) are not recorded with the Register of Deeds, Lender cannot establish the requisite record chain of title; and (4) Lender allegedly breached the Cash Management Agreement by failing to release certain funds to Borrower, without which breach,

Borrower claims it would not be in default or subject to foreclosure. Borrower also asserts trespass to chattels and conversion claims based on the same alleged defects.

Because Borrower's trespass to chattels and conversion claims rely on similar analysis, I will begin with a review of Borrower's claim for declaratory relief.

1. Borrower Has Not Established A Likelihood Of Success On The Declaratory Action Claim

Michigan's foreclosure-by-advertisement statute permits a party to foreclose by advertisement if (in relevant part):

> (1) . . . (a) A default in the condition of the mortgage has occurred, by which the power to sell became operative;
>
> (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage; and
>
> (3) If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale . . . evidencing the assignment of the mortgage to the party foreclosing the mortgage.

9 M.C.L. § 600.3204(1) and (3).

a. Borrower Does Not Dispute That It Is In Default

Lender alleges that Borrower has failed to make payments on the Loan from October 11, 2009 to the present. Lender accelerated the maturity of the Note and demanded payment in full by Demand Letter dated January 14, 2010. According to Lender, the amount due and owing on the Loan as of April 15, 2010 was $18,112,138.80, representing the accelerated principal, interest, prepayment consideration, late charges, and fees.

Because Borrower has offered no evidence to dispute these facts, Lender has satisfied condition (1)(a).

b. Lender Offers Sufficient Proof That It Is The Owner Of The Indebtedness

Borrower argues that Lender cannot satisfy condition (1)(d) – that it owns the indebtedness or an interest in the indebtedness – because it has not provided proof that it is in physical possession of the original Note. Borrower cites *Davenport v. HSBC Bank USA*, 739 N.W.2d 383 (Mich. App. 2007), claiming that Lender's failure to provide such evidence "is a structural defect that goes to the very heart of defendant's ability to foreclose by advertisement." That case is distinguishable. In *Davenport*, the foreclosing bank published the notice of foreclosure *before* it was assigned any rights in the mortgage. The court explained that, where the defendant did not own an interest in the mortgage when it commenced foreclosure proceedings, those proceedings were void. In the instant case, the Second Mortgage Assignment

to Lender was recorded with the Register of Deeds on March 4, 2010, and the notice of foreclosure was first published on March 24, 2010. Thus, *Davenport* is inapposite to the issues in this case.

Nevertheless, I agree with Borrower's basic premise that before Lender can initiate foreclosure proceedings, it must establish that it owns the indebtedness.

Lender has offered testimony by affidavit of David H. Smith[7] that Lender is currently the holder of the Note, Mortgage, and all other Loan Documents, and the First Assignment Documents and Second Assignment Documents. Smith also stated that the Loan Documents, First Assignment Documents, and Second Assignment Documents are true and authentic copies of the original respective documents. Finally, Lender produced the original of each relevant document before the hearing on May 13, 2010. The Court has examined those documents and compared them to copies of the same that each party attached to its court filings.[8] In addition, the Court compared each recorded document with the corresponding copy that Plaintiff independently obtained from the county recorder. The Court's review demonstrates that Defendant is in possession of the authentic original

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[7] David H. Smith is a Senior Vice President for CWCapital Asset Management LLC ("CWCapital"). CWCapital is the Special Servicer for the Trustee of the Trust. The Trust is the sole member of Lender.

[8] Plaintiff has raised no authenticity-based objections to the previously-available copies, instead challenging only whether Defendant was in physical possession of the originals.

documents. The originals bear original signatures in a variety of inks, original recording stamps (and in some cases, original receipts from the recording), affixed stickers identifying the Trust as the assignee, raised notary seals, and all "imperfections" – such as cross-outs and stray marks – that were visible on the copies. The Court has no reason to question the authenticity of the documents and is satisfied that they appear authentic on their face. Accordingly, Defendant has established that it is the holder of the indebtedness.[9]

Arguing in the alternative, Borrower cites numerous cases for what it purports to be the "majority rule" that "if there is sufficient space on a note for endorsement, one does not become a holder in due course if the purported assignment or transfer is pursuant to an allonge."

As Borrower acknowledges, endorsement of a negotiable instrument is governed by M.C.L. § 440.3204. A 1993 amendment to that section added the sentence, "For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is part of the instrument." M.C.L. § 440.3204(1). The commentary to that section explains, "[a]n indorsement on an allonge is valid even

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[9] Borrower argued that, if Lender could not establish its physical possession of the Note, "the party that took *actual* assignment of the Note could still sue [Borrower] for the entire debt." (Motion at 8-10). Because Lender has established its possession, Borrower is no longer at risk of any action for double-recovery by a non-holder. M.C.L. § 440.3602 (providing that any payment to a 'person entitled to enforce the instrument' must be credited against the note).

though there is sufficient space on the instrument for an indorsement."

Thus, regardless of any purported majority rule, an Allonge affixed to a Note effectively negotiates the instrument without regard to space remaining on the original instrument.

Finally, Borrower argues that the allonges were ineffective because they were not "affixed" to the Note. Under Michigan law, an allonge "affixed" to a note becomes "part of the instrument." M.C.L. § 440.3204(1).[10] Borrower cites two non-binding state court decisions from other jurisdictions in support of its argument. The Court's independent research identifies no Michigan or Sixth Circuit authority establishing the method of attachment necessary to create an effective endorsement.

In this case, the allonges presented to the Court were attached to the Note; the First Allonge states that it "forms a part of that Promissory Note dated December 30, 2004 made by" Borrower to Lehman Brothers; and the Second Allonge states that it is "to be attached to, modify, and be a part of that certain

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[10] The previous version of this rule, then in M.C.L. § 440.3202, required an allonge to be "so firmly affixed [to the Note] as to become a part thereof." A 1993 amendment rewrote this section, which now requires only that the allonge be "affixed." The change in language suggests an intent to expand, rather than restrict, the use of allonges. *Cf. Estrada v. River Oaks Bank & Trust Co.*, 550 S.W.2d 719, 728 (Tex. App. 1977) (finding the reverse change – from "attached" to "so firmly affixed . . . as to become a part thereof" – evidenced a clear intent to restrict, rather than expand, the use of allonges).

Promissory Note . . . dated effective December 30, 2004, made by [Borrower] payable to the order of [Lehman Brothers]." In these circumstances, given the clear intent that the Note and Allonges were to be physically attached, the evidence is insufficient to invalidate the endorsements. *See In re Nash*, 49 B.R. 254, 261 (Bankr. D. Ariz. 1985).

c. *Lender Has Established A Record Chain Of Title*

Borrower next argues that Lender cannot satisfy condition (3) because it "has not produced evidence of an unbroken chain of assignments of the Mortgage, beginning with Lehman Brothers and ending with [Lender]." Although Borrower's search of the Register of Deeds revealed assignments from Lehman Brothers to the Trust, and from the Trust to Lender, Borrower alleges that two interim assignments have not been recorded, precluding Lender from satisfying M.C.L. § 440.3204(3). Borrower also challenges the validity of the recorded assignments based on certain technical defects.

(1) The Unrecorded Assignments Do Not Prevent Lender From Foreclosing By Advertisement

Borrower asserts that two interim assignments exist, neither of which were recorded with the Register of Deeds. Citing *Arnold v. DMR Financial Services*, 532 N.W.2d 852, 855-56 and n. 7 (Mich. 1995), Borrower claims that the absence of these assignments in the county record prohibits foreclosure by advertisement. Notably, however, *Arnold* holds that a mortgagee's failure to record an assignment to a third

party as security did not render foreclosure by advertisement void:

> In *Feldman* [*v. Equitable Trust Co.*, 270 N.W. 809, 810-11 (Mich. 1937)], this Court held, and we hold again that [the foreclosure by advertisement statute] provided that only the record holder of the mortgage could foreclose by advertisement, and the mortgagor was not affected by the fact that others had an unrecorded interest in the mortgage . . . . **[T]he existence of equitable rights in the mortgage by persons other than the person who had legal title alone did not create a valid objection on behalf of the mortgagor if the mortgagor was unaffected by those interests.**

Id. at 676-78 (emphasis added).

Although Borrower argues that the holding of *Arnold* is limited to unrecorded assignments for security purposes only, the Michigan Supreme Court addressed unrecorded assignments for the purpose of establishing a trust in *Peterson v. Jacobs*, 6 N.W.2d 533 (Mich. 1942). In *Peterson*, an interim holder held an assignment of a loan for eight months before depositing it into a trust. The assignment to that interim entity was never recorded. The court stated that "**[i]t would have been perfectly useless and serve no good purpose to mention the assignment and reassignment unless such legal formalism is mandatory.**" *Id.* at 536. It then upheld the foreclosure sale, explaining that the statutory requirements need only substantial compliance. "Slight and inconsequential irregularities" – including

the failure to record the short-term interim assignment – did not invalidate the foreclosure by advertisement. *Id.*

In this case, the allegedly missing assignments were held by two entities for a combined total of one month (on or about January 6, 2005, to February 8, 2005), far less than the period at issue in *Peterson*. Borrower has not been affected by any failure to record assignments to those entities. Lender has established a record chain of title from the original mortgagor (Lehman Brothers) to Lender. The chain of title, which substantially complies with the foreclosure by advertisement statute, establishes Lender as the only entity with a right to foreclose by advertisement.

(2) Borrower Lacks Standing To Challenge Validity Of The Assignments

Borrower disputes the validity of the assignment documents on several grounds outlined above. But, as a non-party to those documents, it lacks standing to attack them.

Apart from the minimum constitutional requirements for standing, the Supreme Court recognizes other "prudential limitations" on the question of standing. *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975). Among these limitations, a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.*

Lender argues that under principals of basic contract law, a non-party to a contract does not have the right to challenge the validity of the contract

unless it is a third-party beneficiary to that contract. Borrower counters, without authority, that although as a non-party it cannot *enforce* a contract, Borrower only seeks to "prevent a sale of property" through "examination of the validity of the assignments." (Pl. Reply, Dkt. 20 at 5). Effectively, Borrower seeks to *prevent enforcement* of the assignments – despite the fact that the parties have affirmed their validity.[11]

Borrower certainly has an interest in avoiding foreclosure. But the validity of the assignments does not effect *whether* Borrower owes its obligations, but only *to whom* Borrower is obligated. Although a debtor may assert certain defenses that render an assignment absolutely invalid (such as nonassignability of the right assigned), he generally may not assert any ground which may render the assignment voidable "because the only interest or right which an obligor of a claim has in the instrument of assignment is to insure him or herself that he or she will not have to pay the same claim twice."[12] 6A C.J.S. ASSIGNMENTS § 132. A debtor, for example, cannot raise alleged acts of fraud, or question the motive or purpose underlying an assignment. *Id.*

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[11] By way of affidavit, William Walenczyk, Senior Vice President of Aurora Bank FSB f/k/a Lehman Brothers expressly affirmed the validity of the transfer to the Trust. And David H. Smith, Senior Vice President of CWCapital, the Special Servicer for the Trust, affirmed the validity of the transfer from the Trust to Lender

[12] As noted above, because Lender has established that it holds the original Note, Borrower is not at risk of paying the same claim twice.

In *Pashak v. Interstate Highway Construction, Inc.*, No. 189886, 1998 WL 2001203 (Mich. App. Mar. 20, 1998), the Michigan Court of Appeals held that a lessee lacked standing to challenge the validity of the lessor's assignment of its interest in the lease:

> Although [lessee] challenges the validity of the assignment [of the lease] as between [the assignor] and [the assignees], we find that it lacks standing to do so where the parties to the assignment . . . do not contest its validity.

Id. at * 1 (citing *Woods v. Ayres*, 39 Mich. 345 (1878) (holding that where the parties to an assignment act in accordance with the assignment, and there is no evidence that either party to the assignment objects so as to create a hostile title, a third-party to the assignment cannot challenge its validity)).

And in *Bowles v. Oakman*, 225 N. W. 613 (Mich. 1929), the Michigan Supreme Court held that a maker of a note may not attack the validity of a transfer of that note:

> The fraud of [the assignee] did not render the transfer void. It was at most voidable at the instance of those defrauded. Plaintiff was the holder of the note, and had title to it at the time of trial . . . .
>
> [Debtor] had no defense of his own to the note. He [may not defend on the grounds that] an indorsee had been guilty of fraud upon the payee or the equitable owners. An adjudication upon such defense would not bind the persons defrauded, as they are not parties hereto, and it

> would be idle. This action is by the person having legal title to the note. A judgment herein is conclusive. It makes no difference to [the payor] who may have equitable title to the note, as he has no defense on the merits.

Id. at 614. The court also quoted *Gamel v. Hynds*, 125 P. 1115 (Okla. 1912), with approval:

> The assignor or indorser on negotiable instruments must protect his own interest, where he had been induced to assign or indorse through fraud; and **the maker cannot defend or set up matters of defense which only exist between the indorser and indorsee.**
>
> **The maker of a promissory note cannot, in an action brought against him by the indorsee or transferee thereof, litigate questions that can properly arise only between the holder and his immediate indorser.**

Id. (emphasis added).

Michigan's Commercial Code also recognizes that, except in limited circumstances not applicable here, an obligor of a negotiable instrument may not assert the defenses of another, including the assignor of the instrument. M.C.L. 440.3305(3) ("the obligor may not assert against the person entitled to enforce the instrument a defense ... of another person").

In fact, for over a century, state and federal courts around the country have applied similar reasoning to hold that a litigant who is not a party to an

assignment lacks standing to challenge that assignment. For example, in *Ifert v. Miller*, 138 B.R. 159 (Bankr. E.D. Pa. 1992), the court explained that an obligor lacks standing to challenge an assignment:

> [The underlying contract] is between [Obligor] and [Assignor]. [Assignor's] assignment contract is between [Assignor] and [Assignee]. The two contracts are completely separate from one another. As a result of the assignment contract, [Obligor's] rights and duties under the [underlying] contract remain the same: The only change is *to whom* those duties are owed . . . . [Obligor] was not a party to [the assignment], nor has an cognizable interest in it. Therefore, [Obligor] has no right to step into [Assignor's] shoes to raise [its] contract rights against [Assignee]. [Obligor] has no more right than a complete stranger to raise [Assignor's] rights under the assignment contract.

Id. at 166 n. 13 (applying Texas law). The same analysis applies here. The Loan Documents are between Borrower and Lehman Brothers. The assignments are between (some combination of) Lehman Brothers, LBHI, SASC, the Trust, and Lender. After the assignments, Borrower's rights and duties under the Loan Documents remain the same, the only change being *to whom* those duties are owed. Borrower cannot now step into the shoes of an assignor to assert its contract rights. *See also Liu v. T & H Mach., Inc.*, 191 F.3d 790 (7th Cir. 1999) (party to underlying contract lacks standing to "attack any problems with the reassignment" of that contract); *Blackford v. Westchester Fire Ins. Co.*, 101 F. 90 (8th Cir. 1900)("As long as no creditor of the assignor

questions the validity of the assignment, a debtor of the assignor cannot do so."); *Byczek v. Boelter Cos.*, 230 F. Supp. 2d 843 (N.D. Ill. 2002) (same); *Nicolls Pointing Coulson, Ltd. v. Transp. Underwriters of La., Inc.*, 777 F. Supp. 493 (E.D. La. 1991) ("a debtor cannot challenge an assignment of a debt by a creditor unless he can show he is prejudiced by the assignment"); *The Prussia,* 100 F. 484 (D. Wash. 1900) (holding the validity of an assignment cannot be collaterally attacked on the ground of alleged technical irregularities by a non-party to the assignment, where no objection is made by the assigning entity); *In re Holden*, 2 N.E.2d 631 (N.Y. 1936) ("The assignments were valid upon their face. The assignee was the legal owner of the claims assigned. No one could question the validity of the assignments except the assignors."); *Pagosa Oil and Gas, L.L.C. v. Marrs and Smith P'ship*, No. 08-07-00090, __S.W.3d___, 2010 WL 450910 (Tex. App. Feb. 10, 2010) (finding lessor lacked standing to challenge assignment of lessee's breach of lease action because lessor was not party or third-party beneficiary to assignment contract); RICHARD A. LORD, 29 WILLISTON ON CONTRACTS § 74:50 (4th Ed.) ("**the debtor has no legal defense [based on invalidity of the assignment] . . . for it cannot be assumed that the assignee is desirous of avoiding the assignment.**") (emphasis added).

In light of these compelling authorities, I hold that Borrower may not challenge the validity of assignments to which it was not a party or third-party beneficiary, where it has not been prejudiced, and the parties to the assignments do not dispute (and in fact affirm) their validity.

(3) Even if Borrower Could Challenge The Assignments, It Is Not Likely To Succeed On The Merits

I offer a brief discussion of Borrower' s likelihood of success on the merits, should Borrower have been permitted to challenge the validity of the assignments. First, Lender submits that Borrower made over $5,000,000 in payments to the Trust without questioning whether it was paying to the appropriate entity. It was only *after* Borrower defaulted, and a foreclosure sale was imminent, that Borrower raised supposed irregularities in the Assignments. And as recently as December 22, 2009, Borrower expressly acknowledged that "the Loan Documents are in full force and effect and are binding on [Borrower] in accordance with their terms", "the Loan Documents continue to constitute [Borrower's] legal and enforceable obligations", and "[Borrower] . . . currently holds no claim against Holder." Therefore, even if Borrower was permitted to challenge the validity of the assignments, Lender would appear to have valid defenses of laches, estoppel, waiver, and/or ratification sufficient to rebut Borrower's challenges at this stage in the proceedings.

Next, Borrower argues that the Trust was not created at the time the Assignment to it was executed and thus the assignment should be declared void. Lender explains that the Pooling and Service Agreement, which established the Trust, is dated "as of January 11, 2005" – the effective date of the Assignment to the Trust. Even if the Trust was created later, as Borrower suggests, Lender would appear to have valid counter arguments that the assignments are valid under the *de-facto-corporation*

or corporation-by-estoppel doctrines, or that the parties to the Assignments ratified or adopted the contract(s) after the Trust was formed. *See, e.g., Duray Dev., LLC v. Perrin*, __N. W.2d___, 2010 WL 1461616 (Mich. App. 2010). Ratification or adoption, including by complete performance by the parties, also would appear to "cure" any alleged defects caused by persons executing the contracts without proper authority.[13]

Finally, to the extent Borrower argues that Lehman Brothers' failure to identify an assignee at the time it executed the assignment defeats the requisite "present intent" to make a transfer, the law permits assignment in blank, which authorizes the transferee/holder to fill in the blanks with terms consistent with the parties' intent *See, e.g., McCurdy v. Van Os*, 287 N.W. 890 (Mich. 1939) (holding assignment in blank sufficient to release assignor, where bank (purported assignee) took possession of assignment and related original documents and

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[13] Without citing authority, Borrower claims that David H. Smith lacked authority to execute the Second Mortgage Assignment from the Trust to Lender. For this proposition, Borrower relies exclusively on the absence of Smith's name from CWCapital's Certificate of Organization Under Massachusetts Law, a recordable instrument affecting an interest in real property executed in the name of a limited liability company by any person identified on the Certificate of Organization "shall be binding on the limited liability company." M.G.L. 156C § 66. Although this conclusively establishes the authority of any person named on the Certificate to execute real-property instruments, it does not establish that a person *not named* on that Certificate lacks authority. This would seem to be especially true when the executed instrument does not affect *CWCapital's interest* in real property, but rather an interest of an entity for which CWCapital serves as Special Servicer, as in the instant matter.

exercised control over property consistent with having released assignor from obligations); *Mason Lumber Co. v. Collier*, 41 N. W. 913 (Mich. 1889) ("an assignment, like the one in question here, if filled in with the name of an assignee, after deliver[y] in blank, with the consent of the assignor, would become operative and valid in the party whose name was thus inserted."); M.C.L. § 440.3115 (an incomplete instrument may be completed according to its terms, as augmented with authority of the signer; **the burden of establishing that additions are without authority is on the person asserting the lack of authority**). That all parties to the assignments acted as though they were valid – including physically transferring the original documents to each successor assignee – would appear to defeat Borrower's intent-based arguments without the need to reconstruct history or conduct extensive discovery against non-parties to this action.

2. *Borrower Has Not Established A Likelihood Of Success On Its Remaining Claims*

a. Trespass To Chattels And Conversion

"A trespass to chattels is actionable if one dispossesses another of or intentionally and harmfully interferes with another's property." *Mackie v. Bollore S.A.*, No. 286461, 2010 WL 673295 (Mich. App. Feb. 25, 2010).

Conversion is generally defined as "any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein." *Foremost Ins. Co. v. Allstate Ins. Co.*, 486 N.W.2d 600 (Mich. 1992).

In its Complaint, Borrower argues that Lender's allegedly wrongful efforts to foreclose form the basis for these claims by "interfer[ence] with " and "exertion of wrongful dominion over" Borrower's "Properties." Borrower has cited no authority to suggest that a foreclosure of real property, even if wrongful, can satisfy these personal-property-based claims. Nevertheless, because Borrower has not shown substantial likelihood of success on is declaratory judgment action based on the same allegations, it cannot show a likelihood of success on these claims.

b. Breach Of Contract

Borrower alleges that Lender breached the Cash Management Agreement by failing to release certain funds, in violation of Paragraph 12 of that agreement (describing certain termination events). Borrower claims it provided the proof required to terminate the agreement and release the funds on March 4, 2010, but Lender has refused to tender or otherwise account for the funds. Borrower further alleges that it "could have paid those monies toward the debt obligation . . . so that the Note would not be in alleged default, thereby not causing any alleged default on the Mortgage . . . [leaving Lender] no right to foreclose the Mortgage."

Lender notes that Paragraph 9 of the Cash Management Agreement permits the Lender to "apply the Collateral to the payment of the Debt in any order in its sole discretion" if an Event of Default occurs. Because Borrower defaulted on the loan in October 2009, and the debt was accelerated in January 2010, Lender argues that Borrower was the first to breach and cannot maintain an action against based on Lender's alleged subsequent breach or failure to

perform. *See Flamm v. Scherer*, 198 N.W.2d 702 (Mich. App. 1972).

Borrower does not dispute this, and appears to concede that by the time Lender allegedly breached the Cash Management Agreement, the debt had been accelerated due to Borrower's prior default. The balance due and owing as of January 14, 2010, was over $17,000,000. Even if Lender had released the funds, Borrower would have been unable to cure its default.

Accordingly, Borrower has not shown a likelihood of success on the merits on this claim.[14]

C. **Likelihood Of Irreparable Harm**

With respect to the this factor, the harm that would result in the absence of the injunction must be irreparable, not merely substantial. As the Supreme Court has noted,

> The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.

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[14] Even if Borrower could succeed on this breach of contract claim, it could not show irreparable harm because money damages would be a sufficient remedy. *See Basicomputer Corp, infra.*

Sampson v. Murray, 415 U.S. 61, 90 (1974) (citation omitted).

In evaluating the harm facing the plaintiffs, the court must evaluate three factors: "(1) the substantiality of the injury alleged, (2) the likelihood of its occurrence, and (3) the adequacy of the proof provided." *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987). In establishing the harm, a movant must provide record evidence, such as facts and affidavits, from which the court can make specific findings. *Id.* at 290-91. "[A] plaintiff's harm is not irreparable if it is fully compensable by money damages." *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992).

Borrower submits, without supporting evidence or authority, that "the value of losing its real property (along with established tenants who have leases), the significant tax consequences to [Borrower] if there were a sale, and the loss of goodwill is hard to calculate and cannot be compensated alone with money damages." (Dkt. 15 at 19). Borrower also states without authority that:

> the power to redeem will not return [Borrower] to the status quo, because the tax consequences of the sale cannot be undone; nor can one say with any certainty that [Borrower] will be able to retain its tenants with the specter of a transfer of the property to the new owners looming; nor can one say that [Borrower] will be able to recover its goodwill with the black eye of foreclosure looming . . . . Moreover, the financing terms of the loan which allow payment over time at a desirably low interest

> rate (the Note does not mature until January 2015) will have been lost.

(*Id*. at 20).

Lender argues that Borrower "has been damaged by its own default in failing to make payments as required by the Loan Documents since October 2009, not by any loss caused by Lender's pending foreclosure." Moreover, Lender submits that Michigan's six-month statutory redemption period is an adequate remedy at law sufficient to deny injunctive relief. (Dkt. 16 at 7) (citing *Dumas v. Helm*, 166 N.W.2d 306, 309 (Mich. App. 1968) ("The rights of redemption provided for in foreclosure matters provide defendants with adequate relief")).

It appears that many of Borrower's alleged harms are self-inflicted or speculative – neither of which satisfy the irreparable harm requirement. *See* 11A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE CIV. § 2948.1 (2d ed.) ("Not surprisingly, a party may not satisfy the irreparable harm requirement if the harm complained of is self-inflicted."; "Speculative injury is not sufficient."). With the debt having been accelerated due to Borrower's admitted default, Borrower already has lost its "desirably low interest rate." Similarly, the "black eye of foreclosure" is looming because of Borrower's default, not Lender's actions or any allegedly defective assignment. And Borrower has provided no evidence of a likelihood of loss of goodwill sufficient to justify an injunction.

Finally, because Borrower is permitted to redeem after the sale, it has not shown that irreparable harm will occur at the time of the foreclosure sale. *Sayo v.*

Zions First Nat'l Bank, No. 06-14963, 2006 WL 3392072 (E.D. Mich. Nov. 22, 2006) (rejecting loss-of-goodwill arguments, finding redemption period adequate remedy, and denying motion to enjoin foreclosure); *see also Dumas*, *supra*.

D. Harm To Others And Public Interest

Lender alleges that the present delay in the foreclosure harms it in the amount of $3,595 in lost interest each day, plus legal expenses and attorneys' fees.

In terms of public policy, as Judge Hood explained in *Sayo*, *supra*:

> there are public policy arguments in favor of both sides of the dispute. Public policy disfavors the sale of real property through foreclosure auctions, but also favors parties to honor contractual agreements, such as the Mortgage Agreement in this case.

E. Balancing The Factors

The critical first and second factors weigh in favor of Lender. Borrower cannot demonstrate that it will succeed on the merits or suffer irreparable harm caused by the failure to issue an injunction. As to the third factor, Borrower has not shown that its harms decidedly outweigh Lender's harms. And, because Borrower contractually agreed to the foreclosure-by-advertisement remedy, public policy does not favor permitting Borrower to escape its contractual obligations, especially where it cannot satisfy the other factors.

The court will not issue a preliminary injunction to prevent Lender from foreclosing by advertisement.

IV. CONCLUSION

Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (Dkt. 1, Attachment #3) is DENIED with prejudice; and

Wayne County Circuit Court's April 15, 2010 Temporary Restraining Order, extended by Order Extending Effect of Temporary Restraining Order (Dkt. 14) is DISSOLVED.

IT IS SO ORDERED.

Date: May 13, 2010

s/ John Feikens
John Feikens
United States District Judge

[*Proof of Service omitted in printing this appendix*]

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

Case No: 2:10-CV-11589-JF-VMM
Honorable John Feikens
Magistrate Virginia M. Morgan

[Filed April 22, 2010]

LIVONIA PROPERTIES HOLDINGS, L.L.C., a Michigan limited liability company	)
Plaintiff,	)
vs.	)
12840-12976 FARMINGTON ROAD HOLDINGS, L.L.C., a Maryland limited liability company	)
Defendants	)

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ORDER EXTENDING EFFECT OF TEMPORARY RESTRAINING ORDER, SETTING HEARING DATE, AND SETTING DEADLINE FOR DEFENDANT'S RESPONSIVE PLEADINGS

This matter came before the Court on Plaintiff's Motion to Extend the Effect of the state Court's April 15, 2010 Temporary Restraining Order until this Court holds Hearing on Whether the Temporary Restraining Order Should be Made into a Preliminary Injunction. Based upon the Court's review of Plaintiff's Motion and being advised in the premises,

IT IS ORDERED THAT the Wayne County Circuit Court's April 15, 2010 Temporary Restraining Order entered in this matter is extended to May 14, 2010.

IT IS FURTHER ORDERED THAT the parties shall appear for a hearing in this matter on May 13, 2010 at 10:00 a.m.

IT IS FURTHER ORDERED THAT the parties shall submit any responses and briefs on or before April 29, 2010.

s/John Feikens
John Feikens
United States District Judge

Dated: April 22, 2010

[*Certificate of Service omitted in printing this appendix*]

APPENDIX E

STATE OF MICHIGAN
IN THE THIRD JUDICIAL CIRCUIT COURT

10-004441-NZ

[Filed April 15, 2010]

Livonia Properties Holdings, L.L.C.,	)
	)
Plaintiff,	)
	)
-vs-	)
	)
12840-12976 Farmington Road Holdings, L.L.C.,	)
	)
	)
Defendant.	)
	)

TEMPORARY RESTRAINING ORDER PURSUANT TO MCR 3.310(B)(1)

AND

ORDER TO SHOW CAUSE WHY THIS ORDER SHOULD NOT RESULT IN A PRELIMINARY INJUNCTION

At a session of said Court held in the City of Detroit, Wayne County,

Michigan on: APR 15 2010

Present: HONORABLE JOHN H. GILLIS, JR.
Circuit Judge

Plaintiff Livonia Properties Holdings, L.L.C. ("Livonia Properties") has filed a Verified Complaint and a Motion for Temporary Restraining Order and Preliminary Injunction (the "Motion"). The Court has considered the Verified Complaint and the Motion and has made a permanent record of any nonwritten evidence, arguments, and representations. The Court is otherwise advised in the premises.

NOW THEREFORE, IT IS ORDERED that the Motion is **GRANTED.**

IT IS FURTHER ORDERED that, pursuant to MCR 3.310(B), Defendant 12840-12976 Farmington Road Holdings, L.L.C. ("Farmington Road Holdings"), its agents, assigns, officers, attorneys, representatives, employees, and anyone working for it, through it, in contract with it, or in concert with it **IS RESTRAINED** from selling, attempting to sell, instructing others to sell the properties set forth in a certain Mortgage between Lehman Brothers Bank, FSB and Livonia Properties, which Mortgage is attached to the Motion as Exhibit 1, including:

A Parcel A: 27475-27603 Schoolcraft (Tax ID No. 46-097-99-0015-002);

B. Parcel B: 12840-12898 Farmington Road (Tax ID No. 46-106-02-0001-000);

C. Parcel D: 32421-32483 Schoolcraft (Tax ID No. 46-106-01-0030-001);

D. Parcel F: 31175-31209 Schoolcraft (Tax ID 46-102-99-0063-000),

as well as any properties listed in the Foreclosure Notice attached as Exhibit 5 to the Motion (all, collectively, the "Properties").

IT IS FURTHER ORDERED that, pursuant to MCR 3.305(C) and MCR 3.310(B), Farmington Road Holdings, its owners, members, shareholders, agents, assigns, officers, attorneys, representatives, employees, and anyone working for it, through it, in contract with it, or in concert with it is ordered to take all necessary steps to remove any Foreclosure Notices published or posted, and to advise the appropriate authorities conducting the auction that the Foreclosure Sale shall not proceed unless and until further order of this Court.

IT IS FURTHER ORDERED that no sale or auction of the Properties shall occur until further order of the Court.

In entering this Order, it appears to the Court as follows:

i. that pursuant to the arguments set forth in the Verified Complaint and the Motion, Farmington Road Holdings does not have the authority to assert rights of a mortgagee under the Mortgage;

ii. that pursuant to the arguments set forth in the Verified Complaint and the Motion, Farmington Road Holdings does not own, have possession of, or have the right to enforce the Promissory Note, attached as Exhibit 2 to the Motion, or other indebtedness purportedly secured by the Mortgage;

iii. that pursuant to the arguments set forth in the Verified Complaint and the Motion, Farmington Road Holdings does not have the right to foreclose the Mortgage by advertisement under MCL § 600.3204;

iv. that pursuant to an April 12, 2010 letter of Andrew W. Mychalowych (attorney for Livonia Properties) to Eric C. Bartley (attorney for Farmington Road Holdings), attached as Exhibit 6 to the Motion, Livonia Properties has demanded that Farmington Road Properties adjourn the Foreclosure Sale unless and until such time as Farmington Road Holdings provide proof of, among other things, possession and ownership of the Promissory Note and a chain of ownership of the Mortgage, beginning with Lehman Brothers Bank, FSB and ending with Farmington Road Holdings;

v. that Farmington Road Holdings has not yet provided such proof;

vi. that Livonia Properties has attached a Cash Management Agreement to the Motion, Exhibit 9, and sufficient proof that Livonia

Properties has the right to terminate the Cash Management Agreement, Exhibit 10, which, upon termination, "all funds remaining in the Property Account and the Lender Collateral Account shall be released to Borrower [Livonia Properties]." It appears that substantial sums in said accounts have not been released to Livonia Properties, monies which Livonia Properties contends could be used to pay the Promissory Note and would have avoided alleged default on the same.

vii. that a foreclosure of the Properties is scheduled to occur on April 22, 2010, at 1:00 p.m. at the Wayne County Circuit Court, and that, in accordance with the facts set forth in the Verified Complaint and the facts and arguments set forth in the Motion and the Exhibits attached thereto, the sale of the Properties would exact irreparable harm to Livonia Properties if the Court did not retrain Farmington Road Holdings in the manner set forth herein;

viii. that, in accordance with the facts set forth in the Verified Complaint and the facts and arguments set forth in the Motion and the Exhibits attached thereto, Livonia Properties is likely to succeed on its declaratory action and its trespass to chattels and conversion claims, and its breach of contract claims;

ix. that, in accordance with the facts set forth in the Verified Complaint and the facts and

arguments set forth in the Motion and the Exhibits attached thereto, the balance of the harms in issuing this restraining order favors the Livonia Properties because Livonia Properties will suffer substantially more harm if the restraining order is not issued than Farmington Road Holdings would suffer if the retraining order were issued;

x. that, in accordance with the facts set forth in the Verified Complaint and the facts and arguments set forth in the Motion and the Exhibits attached thereto, the public interest will be served by entering this restraining order because the Court is restraining the sale of the Properties where it appears the purported mortgagee, Farmington Road Holdings, does not have a right to sell such Properties.

IT IS FURTHER ORDERED that, pursuant to MCR 3.310(B)(2)(c), the Court orders that a hearing on Livonia Properties' Motion shall take place on April 21, 2010 in order to determine whether this restraining order should result in a preliminary injunction.

IT IS FURTHER ORDERED that the Court shall not require security to be posted because there does not appear to be any appreciable harm to Farmington Road Holdings even if this Court were to ultimately dissolve this Restraining Order.

IT IS FURTHER ORDERED that this Order shall expire on 4-22-10.

Dated APR 15 2010, 2010
Detroit, Michigan

JOHN H. GILLIS, JR.
Honorable
Circuit Court Judge